UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
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In the Matter
of Index No.
1-08-01789

SIPC V. MADOFF,
Debtor.
----------x
June 16, 2009
United States Custom House
One Bowling Green
New York, New York 10004

Motion to approve an agreement by and among the Trustee and Optional Strategic U.S. Equity Limited and Optimal Arbitrage Limited, et al.

B E F O R E:

HON. BURTON R. LIFLAND,

U.S. Bankruptcy Judge

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PROCEEDINGS

THE COURT: SIPC v. Madoff.

MR. HIRSCHFIELD: Marc Hirschfield, from the law firm of Baker Hostetler. I am here today with my two colleagues on behalf of Irving Picard, the Trustee. They are Marc Powers and and David Sheehan we have two matters on the calendar this morning.

The first is a motion under Rule 9019 to settle with the Optimal funds and the other is Bank of America for a preliminary injunction.

With Your Honor's permission we do like to do the settlement first.

THE COURT: Go ahead.

MR. HIRSCHFIELD: Thank you, Your Honor.

As I said, the first motion relates to settlement with two funds operated by Optimal Strategic US Equity Limited and Optimal Arbitrage Limited. Under the settlement Optimal will return to the Trustee approximately 235 million dollars. This amount reflects a payment to the Trustee of 85 percent of the preference claims the Trustee has asserted against Optimal.

By way of explanation, Optimal Strategic, U.S., opened up an account with BLMIS in January of 1997. They withdrew about 152 million dollars within the 90-day preference period before the case was commenced.

The other fund, Optimal Arbitrage Limited opened up an account with BLMIS in February of 2006 and it withdrew approximately 125 million within the 90-day preference period.

The Trustee believes that the amounts received during the preference period are recoverable under Section 547 and 550 of the Bankruptcy Code and the Trustee sets a demand on Optimal under a 2004 subpoena requesting discovery information from Optimal.

Therefore, Optimal approached us to commence some negotiations, and as I mentioned these negotiations went well. We reached an agreement under which will return to the Trustee 85 percent of the amount it received during the preference period which is about 235 million dollars.

The settlement agreement is memorialized in an agreement and as such SUS upon the timely filing of a claim in the SIPA proceeding will have an customer claim of approximately 1.5 billion dollars. It will be permitted to offset the 500,000 SIPC advance, it would be entitled to on account of its allowed claim in its distribution by the Trustee.

Arbitrage will in a single payment and five installments of and 18 million dollars each month for five months thereafter.

It, too, will offset the $500,000 SIPC advance it would have received, and it will do that from the last payment it owes us. And it will have upon the filing of the claim, a claim in the amount of 9.8 million dollars.

The Trustee will withdraw the rule 2004 subpoena and will not seek any other discovery with respect to claims released under the agreement. Under the settlement agreement both the Trustee and Optimal will exchange releases and under the most favored nation clause. It is the goal of the agreement to serve as a benchmark for future settlement under the terms of the agreement if the Trustee resolves claims similar to the claims resolved with Optimal equal to this 85 percent benchmark. If the Trustee settles for more than $40 million or less than the benchmark 85 percnet, the Trustee may be required to return certain amounts to Optimal under these circumstances.

In connection with that we did extend due diligence to Optimal to see if we had any claims against them. And based upon that we conclude Optimal was not complicit in the fraud that BLMIS and Madoff committed and did not have actual knowledge of the fraud on BLMIS customers, and based on that review we do not believe we have had any claims against Optimal other than those avoiding power claims or to disallow any claim that SUS or

Arbitrage may have against BLMIS or its estate if we do.

Under the terms of the settlement we did receive information subsequently that Optimal, that basically would have affected the Trustee's decision to enter into the agreement.

We do have the ability to void the agreement by giving notice to Optimal and return the money we are getting under the settlement and each of the parties will have all rights and defenses as through the agreement was never executed.

I should mention that certain other funds that Optimal will use to repay the funds, are being held by affiliates of and by HSBC and we would request that they freeze those amounts.

In connection with that we will ask HSBC to release that information and they agreed and we will release claims that we may have or potentially have against HSBC that arise from their dealings with Optimal, and that will be set off in a separate letter agreement with HSBC.

We believe the settlement is a very good one, and we do hope it will be a benchmark for future settlements. Among other things Optimal asserted a potential standing defense and jurisdictional defense it may have if we commence litigation against Optimal.

Given those defenses and what we believe

would prevail, we think it is appropriate to resolve the claims as set forth in the settlement because it gives certainty, both in Court and on any appeal, and it also resolves the claims.

We do hope this will provide a basis for future settlements, and we hope that the other funds will do what Optimal has done, and do the right thing and go forward to resolve claims, and in that regard we appreciate Optimal having come forward to resolve those claims.

THE COURT: Does anyone want to be heard?

MR. BELL: Kevin Bell from the Securities Investor Protection Corporation. We support the settlement. We find this to be an encouraging sign and that the Trustee is getting that amount of money we will have available to distribute to the victims beyond the limits of the SIPC protection, and we would encourage the Court to approve the settlement.

THE COURT: Does anyone else want to be heard?

Hearing no one respond, let me see if I understand two points of the bottom line here. Optimal has filed a 1.5 billion dollars claim if --

MR. HIRSCHFIELD: They have not yet. They will after the settlement is approved.

THE COURT: I take it that is a reflection

on the statements that they have been receiving from the Madoff --

MR. HIRSCHFIELD: No. It is cash in and cash out, Your Honor.

THE COURT: So it has nothing to do with the reflection on the statements?

MR. HIRSCHFIELD: No.

THE COURT: And they end up with a 9.8 million dollars claim?

MR. HIRSCHFIELD: No. There are two funds. The one fund has a claim SUS for 9.8 million dollars, that is Arbitrage. The other one SUS will have a claim for 1.5 billion dollars.

THE COURT: I see. Does anyone else want to be heard?

I am most interested in the most favored nation aspect of this which puts the Trustee more or less in a rigid negotiating stance as it loses the benefits of this settlement to the extent that other settlements come in substantially less.

Does anyone want to be heard with respect to that?

MR. HIRSCHFIELD: I do, Your Honor. We negotiated very heavily on the most favored nations clause, and it only applies in very limited circumstances where the

settlement is under similar circumstances and facts of the settlement. So, for instance, and the agreement lists other factors the Court would consider if we don't agree with Optimal, including jurisdictional basis, the ability to pay, what kind of claims we assert.

There is a whole litany of factors that the Court would ultimately consider, and we feel comfortable, ultimately, if we settle other claims similar to the ones that are settled here that they should follow at 85 percent.

THE COURT: Does anyone else want to be heard?

Under any circumstance I just find it a highly appropriate settlement and in the best interests of this estate, and to the extent that the Madoff victims see a more enhanced pot to look at, it certainly is a salutary agreement and I will approve it.

MR. HIRSCHFIELD: May I approach with an order, Your Honor?

THE COURT: Yes.

MR. HIRSCHFIELD: Thank you.

THE COURT: I have approved the order.

MR. HIRSCHFIELD: Thank you, Your Honor. The next motion is by Bank of America.

MR. JANOVSKY: Good morning, Your Honor.

Peter Janovsky. I am an attorney with the law firm of Zeichner Ellman & Krause. I am here today on behalf of the plaintiffs, Bank of America and Bank of America Securities.

I think the Court is familiar with circumstances from the conference we had on the TRO a couple of weeks ago.

Basically, the two bank entities have certain accounts in the name of two entities and the banks has received notice from the Trustee that the amounts in all those accounts were customer property under SIPA, and instructing the bank if they permit any withdrawal it would be a willful violation of the automatic stay.

Before the bank came to this Court the Maxam entities, some of the defendants here, brought an action in the Connecticut State Court. Then we brought this interpleader and removed that action in Connecticut Federal Court.

And now we and the Trustee believe that this Court is the most appropriate place to determine whether the funds at issue are actually customer property, property of this estate. We received opposition from the Maxam entities, and they make two arguments that I would like to address.

One of the arguments, Your Honor, is that the stay can be extended only in a reorganization case and

this is not a reorganization case.

Well, Your Honor, that is simply incorrect. There are cases in which the stay has been extended in Chapter 7 liquidations. There is In re: Fisher in the Seventh Circuit, 155 F.3d 876 and there is another case, at least one other case in the Middle District of Florida.

So it is simply untrue that that can't be done. In fact, the language of those cases, even the reorganization cases, the language of those cases say that the 105(a) injunction can be applied if the other actions are going to impair the reorganization or which would defeat or impair this Court's jurisdiction or may affect the amount of property in the bankruptcy estate.

So that language which I believe this Court cited in the Calpine case certainly leaves the door open to have this kind of injunction even in a liquidation proceeding such as this.

In fact, under the concerns that the Court just expressed in terms of the settlement and to get maximum return for the Madoff investors, I believe it is even more important that this Court be the Court to determine whether the funds in these bank accounts are actually property of the estate.

The other issue that the opponent brought up is whether there would be irreparable harm to the Bank

of America in the event that the Connecticut action proceeds.

As far as that is concerned, this Court has ruled in the Second Circuit and in a number of cases, the court in the Second Circuit has ruled there is an exception to the irreparable harm standard under 105(a) where, again, there is a danger that the other action would impair the jurisdiction of this Court.

So while I don't believe that there is irreparable harm to Bank of America other than substantially more litigation costs, I think we should imagine the scenario if this relief is not granted.

We would be going back up to Connecticut and the Trustee is not a party in that case. I don't know whether the Trustee would join that case. We would have to come back here and make a motion to lift the stay to name the Trustee in that case in Connecticut. And that motion may not be granted.

There would be also be issues of discovery relating to the possible subpoenas of 30 parties, et cetera. So to summarize, Your Honor, 105(a) need not be asserted only in reorganizations. There is no irreparable harm required in a case such as this.

And finally, the harm would be great in terms of impairing this Court's jurisdiction, having

another Court determine what might be customer property and, generally, creating a situation in which I think that it would be extremely inconvenient for all parties and with some risk to the investors in this case.

So in terms of that last factor, I think we have a balance of equities and we have public interest in recovering these funds heavily tilted towards the Trustee's and Bank of America's position.

Thank you, Your Honor.

THE COURT: Does anyone else want to be heard.

MR. O'NEIL: Benjamin O'Neil, with the law firm of Kobre & Kim. I am here on behalf of Maxam Capital Management, what we refer to in the papers as the investment manager, there is no disagreement this Court is the proper forum to determine the issue of whether the funds contained in the Bank of America accounts are customer property.

The action that Maxam is pursuing in Connecticut seeks only to hold the bank responsible for what Maxam considers to be tortious conduct that was done to it over the last several months.

Your Honor, contrary to what the bank's counsel has intimated, we simply are not seeking in that case to determine whether the funds in the accounts are

customer property. That is not an issue in the case, nor are we seeking access to the fund in that case.

Rather, Your Honor, once the bank after several months of proceeding without any Court Order determined that it was finally time to have a Court weigh in on the parties' rights with respect to the property and file the interpleader action in this Court, Maxam determined at that point and believed them as it believes now that this is the Court in which the determination should be made as to customer property.

Moreover, Your Honor, Maxam conveyed that to both counsel for the bank and the Connecticut Court in a conference call immediately after Bank of America filed the interpleader action. Indeed, Your Honor, we planned to file papers in the near term in this Court to seek an expedited determination of whether the accounts actually do contain customer property.

And I realize the facts are laid out in our brief, Your Honor, but I would like to briefly summarize why Maxam believes it is important that it be able to pursue its claims in Connecticut.

The Bank of America received a notice from the Trustee, Trustee's counsel, in a form letter which essentially intimated that certain funds belonging to Maxam Absolute Return Fund may constitute customer property and

thereby be subject to the automatic stay. That letter made no reference to any funds of my client, the investment manager.

But the bank pretty much of its own volition determined that it would freeze not only the Maxam Absolute Return Fund account but it would also freeze the accounts of the investment manager.

It basically not only without a court order but without any requests from the Trustee; my client then contacted Bank One. It realized its investment manager accounts had been frozen and sought some sort of explanation why those accounts would be frozen given it had no notice of the fact that funds in those accounts might constitute customer property.

At that point the bank said simply it had a request from the Trustee and that it was freezing the accounts.

Maxam asked for a copy of the letter indicating from the Trustee the desire to have those accounts frozen and the bank refused.

THE COURT: Are you trying that issue before me now?

MR. O'NEIL: Which issue, Your Honor?

THE COURT: The issue as to the bank's liability separately for your client.

MR. O'NEIL: No, we are not trying that issue.

THE COURT: It sounds like it. The issue is whether or not I should issue an injunction with respect to the continuation of the Connecticut lawsuit.

MR. O'NEIL: I understand, Your Honor. I am simply trying to explain to you what, in fact, our claims in Connecticut are based on. I could continue or --

THE COURT: I have read all the papers.

MR. O'NEIL: Okay. I think the point I am trying to make, Your Honor, is that our claims in Connecticut have absolutely nothing to do with any issue of whether the funds in the account are, in fact, customer property and there is simply no legal basis on which to stay an action by one non-Debtor against another non-Debtor where there is no risk of any harm to the estate much less the irreparable harm.

MR. LAWLOR: James Lawlor, Your Honor. I am with the law firm of Wollmuth Maher & Deutsch, on behalf of Maxam Absolute Return Fund, LP, which is the actual investment fund.

We didn't take a position on today's motion, but I wanted to be here in case you had any questions.

THE COURT: Thank you.

MR. POWERS: Marc Powers, Your Honor. I am with the law firm of Baker Hostetler, on behalf of the Trustee, Your Honor.

We join in the application of the Bank of America. As set forth in our papers the Trustee and the estate has a 90-day preference claim of 25 million dollars against the Maxam fund. We understand that fund has very little money left in it other than the Bank of America account which at this point is not very large.

Separately there have been transactions identified in our papers, an additional 72.8 million dollars from BLMIS to the Maxam Fund. That money subsequently was transferred further. We believe, obviously, there are direct transfers as well as subsequent transferees that potentially have the liability and potentially have to return money for the estate for administration before this Court as presented by the Trustee.

The two primary points that have been raised are -- let me back up to say one other thing, Your Honor. The entities themselves are all related. Since Your Honor allowed the Trustee to issue 2004 subpoenas for documents and testimony with no less than four different subpoenas to Maxam Absolute Return Fund and Maxam Capital

to get documents, of which we still don't have to have testimony from Ms. Mansky (phonetic), which they objected to up until this morning.

They made it very difficult to get to the bottom to see where there is exposure. We still don't have the testimony from Ms. Mansky, who was also one of the co-owners of Tremont, where she sold her interests and she received over $16 million from that sale.

Since the issuance of these subpoenas, we tried to attempt to identify to the extent we can the manner in which subsequent transfers may have liability here. What we have is the transfer of 25 million dollars within the 90-day period. That money went to two places, it went to Maxam Capital Management which is Ms. Mansky's company, the management company, both in fees, advisory fees, which over the last two years were 2 and-a-half million dollars, much more than the amount remaining in the Bank of America accounts.

Additionally, it went to the offshore account called Maxam Fund Ltd., an offshore account, which is a both a domestic account and a foreign account. Most of that money was split off to the foreign account. We made a request for three or four months to learn the identity of the investors that received that money to make an appropriate determination through our investigation

whether or not it would make sense for the Trustee to present any claims against those individuals to assets whether or not they acted in good faith or not. That is part of our job and part of our responsibility.

In addition, looking at the Bank of America account we have been able to identify this is the commingling of transfers and funds among the various accounts it maintains between the Maxam domestic fund, Maxam Capital, Maxam Capital operating account, its money market account, for which it took out $930,000 when they were denied the TRO by the Connecticut Court and also money that we then learned by looking at the bank statements went into the Bermuda account for the Maxam foreign fund. We have been stymied in our efforts.

Let me address the two points raised specifically in opposition to the application of Bank of America.

The first is the bank account was identified that was related to Section 105 and their argument is that it only applies to reorganization.

As Mr. Janovsky pointed out, there is a case in the Fisher case, Seventh Circuit, which specifically states that it doesn't just apply to reorganization and liquidations and something else that I am sure Your Honor would remember. I believe from almost

20 years ago your decision in the Pioneer case of 1990 in which the case was called --

THE COURT: Some people call it Eastern Airlines.

MR. POWERS: I guess you could tell who the straight bankruptcy attorneys are and who aren't.

You state in the exceptions to the automatic stay, which are set forth in 362(b), are simply exceptions to the stay which protect the estate automatically at the commencement of the case, and are not limitations upon the jurisdiction of the Bankruptcy Court or upon its power to enjoin. The power is generally based on Section 105 of the Code.

The Court has ample power to enjoin actions exempted from the automatic stay which might interfere in the rehabilitative process whether in a liquidation or in a reorganization case.

So there is no merit to the argument that somehow this is a different case than a reorganization.

The second point that is raised by counsel that somehow this is not related, that their case in Connecticut is completely different. It doesn't impact the jurisdiction of this Court, if doesn't impact the issues about whether or not this is customer property, they don't think that needs to be decided; we respectfully submit that

is not true.

One of the two claims that are brought in the Connecticut Court was a conversion claim, and even as they state in their papers by conversion defense that the Bank of America could assert it was justifiable, it was proper for them to be able to hold onto those assets, to make those determinations as that defense.

THE COURT: That is an obvious defense that they are making.

MR. POWERS: Yes, obviously. And as a result of that their defense will be --

THE COURT: It turns on the issue of customer property.

MR. POWERS: Perfect.

So I would submit, Your Honor, that is clearly related and there are Courts that, in fact, I would say, as in a related case, as identified in the Fisher and other cases, that clearly that is something that this Court has the power under Section 105 to enjoin at this time.

One further point on that, Your Honor, to the extent you were not to enjoin, as we had the issue that Mr. Janovsky has identified as a possible collateral estoppel.

If that court were to determine customer property how does that impact us here? The one other thing

I would like to add and ask this Court for cooperation for today we had notice, and it is set forth in our papers. We ask that this Court also extend the stay in light of the fact we can have yet to depose Ms. Mansky. She had been subpoenaed earlier this month to appear at a Rule 2004 examination.

Your order back in January said on a 15-day notice that person is to appear. Tomorrow is 15 days. She was properly served in that regard. Some argument was made she was not properly served and then they withdrew that. However, they asked that we push it off to a date of July 2 or July 7, and that works for us.

But we would ask two things. One is that the Court order it so it occurs. Secondly, I want it to be clear that the only thing that could be asserted are privilege issues and that assertion potentially for confidentiality of trade secrets. I think that is an option that is not subject to a confidentiality agreement and should not be.

MR. O'NEIL: I object, Your Honor, there is no application in on that point.

MR. POWERS: And we do not want, Your Honor, to be able to somehow before be given an understanding that it will go forward based on the representation on July 2 or July 7, some sort of new

gamesmanship to prevent that from occurring. We want to make sure this issue gets dealt with so there is no delay. It has been four and-a-half months since we issued that subpoena, and we have yet to get what we need to conduct our examination properly to make the proper determinations for the Trustee. Thank you.

THE COURT: Does anyone else want to be heard?

MR. O'NEIL: I would like to respond, Your Honor.

Mr. Powers obviously raised a litany of issues. There has been no application for an order of the Court to force Ms. Mansky to appear. In fact, counsel and I were negotiating right before this hearing to have her appear.

THE COURT: There is an underlying order with respect to the 2004 subpoenas.

MR. O'NEIL: Which we are not in violation of.

THE COURT: I understand that, and I think the argument is the quality of that deposition is somehow appropriately to be discussed today. It may be if there are issues with respect to the scope of the examination under our local rules that could be played out in advance of the actual deposition. Somehow or other that seems to

be happening right now.

MR. O'NEIL: I understand, Your Honor. We have received no notice that would happen this morning.

MR. POWERS: Counsel for the Trustee just raised it right now.

MR. O'NEIL: That is not exactly true.

MR. POWERS: I sent a letter to Mr. Kogan, counsel for Ms. Mansky yesterday.

THE COURT: So far I have not heard of any problem with respect to the scope and content and narrowing of the deposition which has been scheduled. And to that extent I direct that the deposition go forward as has been agreed to by the parties.

MR. O'NEIL: Okay. I would like to respond. We take issue with the majority of the factual assertions made by Mr. Powers. We are more than happy to litigate those issues in this Court.

But they are simply not relevant to the issue whether this Court should stay the Connecticut action. The Maxam claim against Bank of America. At the time that the bank was executing the freeze, it had no legal authority to do so. If, in fact, a Court later determines that there was a legal basis on which the bank froze the money, at the time the bank was proceeding it didn't have that basis to do so. It was doing so

completely of its own volition. There was no court order. And, in fact, there was not even a request from the Trustee that Maxam Capital Management's investment accounts be frozen. The bank did it solely on its own.

So, we would submit that in order for the Connecticut Court to decide the issues of whether the bank is liable for conversion and negligence, which is the other claim in the Connecticut action, there doesn't need to be a determination of whether those accounts constitute customer property. And, moreover, Your Honor, as I have mentioned, we plan to seek an expedited review in this Court as to whether those accounts do, in fact, contain customer property.

We fully agree this is the proper Court to decide those issues and to litigate those issues.

THE COURT: Thank you. Does anyone else want to be heard?

MR. JANOVSKY: One more point, Your Honor. This raises an important issue relating to the Bankruptcy Court's jurisdiction. What does a bank do when it gets a letter that says, these are funds of the property of the estate? Does it immediately have to run to Court and bring an interpleader?

If there is no order and the Trustee does not bring a motion, what does the bank do? They say the

bank acted improperly. I question some of the facts, but that is something I think the Court should determine.

THE COURT: Thank you. There has been a history with respect to the parties dealing with each other both in this Court and in the Connecticut court.

As I do recall from reading all of the papers, even the Connecticut Court had some reservation as to the litigation being brought by the respondent here to this motion. I think the Connecticut Court refused to issue a stay in their favor at one point in time. However, it is still under review there.

The action has already been removed to the Federal Court. And the last bit of colloquy before me just now reinforces the fact that all parties seem to agree that the appropriate place for the Court to make almost all of the determinations at issue is here and they should be centralized here.

An express detail with respect to that concession is that the Connecticut action is a two-party dispute between the respondent here and the Bank of America. I don't see that. I do see that the Connecticut action would impact on the jurisdiction of this Court especially with respect to the issue of customer property.

If the Bank of America appropriately is asserting a defense both here and in Connecticut, asserting

it believes it was holding customer property, whether it was property or not, that issue was customer property is one that would be the subject of the collateral estoppel if I didn't enjoin and grant essentially the request of all the parties that the dangling litigation at issue here should be decided in one Court.

That undercuts also the argument that an injunction need not be purely one applicable to a reorganization.

I find that there is no merit to that and we have the cases that would say the same.

Under all these circumstances I think it is appropriate for me to grant the relief requested by Bank of America, joined in by the Trustee and with respect to one respondent taking no position, that is either a no vote or a yes vote and is more likely a yes vote since there is an alignment of issues here, not taking a position is a very interesting point that this Court takes note of.

Accordingly, the motion is granted and the other part of it is the removal action which is now sitting in the District Court in Connecticut; is that correct?

MR. JANOVSKY: Yes.

THE COURT: Is that subject to further removal on a separate application or is it automatic based upon removal statutes and rules that exist under Title 11?

MR. JANOVSKY: It is not subject to further removal.

THE COURT: The Trustee is not a party. But the Trustee is involved in the issues. I leave it to the parties to work it out. In any event, the injunction with respect to the Connecticut action is granted. If the parties can agree we could open up that litigation and have it determined, so it is not something that is sitting around subject to further collateral estoppel based on the outcome of the proceedings in this Court as it might affect that matter. But all parties seem to be really willing to come to grips and get the issues determined once and for all.

Please submit an appropriate order.

MR. HIRSCHFIELD: Thank you. That is all we have on the calendar this morning for the Madoff.

(Chambers conference)

(Second call.)

THE COURT: Madoff.

MR. SHEEHAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. SHEEHAN: As Your Honor is aware on behalf of the Trustee we filed an application for a temporary restraining order and a respective date for another hearing with regards to certain funds being held by

Morgan Stanley pursuant to direction by the Trustee's counsel which has now become the subject of a focus by the Attorney General of the State of New York by virtue of an action instituted against Ascot Capital Partners which is, in fact, the name associated with that account.

We have arrived at an agreement with counsel for the Attorney General of the State of New York with regard to this particular issue, and I want to put it on the record so we fully understand what it is. The agreement is as follows: That --

THE COURT: This is as we discussed in chambers --

MR. SHEEHAN: Yes, Your Honor.

THE COURT: -- of a proceeding that already exists and that is adversary proceeding 09-11982, involving Gabriel Capital, Ascot Partners, and Gabriel Capital Corporation, and the recently filed request by the SIPC Trustee, Irving Picard, for a temporary restraining order and a preliminary injunction and they are addressed to the current parent --

MR. SHEEHAN: Yes, Your Honor.

THE COURT: -- with the involvement of the Attorney General of the State of New York.

MR. SHEEHAN: Absolutely, Your Honor. And under that umbrella case that Your Honor is speaking of,

what we have agreed to is this.

We will basically withdraw our application for TRO, subject to an agreement to be entered into with the Attorney General to the effect that, first of all with respect to these funds, they will remain frozen and until such time the agreement was entered into.

Therefore, pursuant to this amendment in the sum of $350,000 will be released by the Trustee to and from that account at Morgan Stanley to the Attorney General of the State of New York.

Therefore, a receiver will be appointed for Ascot Capital Partners. That receiver will then make an evaluation of several things including the preference and avoidance actions instituted by the Trustee against Ascot Capital Partners and a settlement that has been offered to the Attorney General of the State of New York with regard to the settlement of those claims by the Trustee against Ascot Capital Partners.

The funds that are being held, Your Honor, by the Trustee at Morgan Stanley would also be utilized to help fund the settlement engaged in by the Trustee. In fact, the vast majority of those funds would come to the Trustee pursuant to that agreement.

Therefore, the receiver as we understand it, is in contemplating the cause of action against the

Merkin individual, and Mr. Merkin for its breach in Gabriel Capital Management, which was also involved in the management of those enterprises.

Pursuant to our agreement with the receiver which will be entered into as part of the overall payment of the preference and fraudulent conveyance will take place of funds retrieved, hopefully, out of Mr. Merkin and at that point the receiver will receive payment towards the preference and avoidance actions as part of the settlement that is being entered here with the Attorney General.

It is in the best interests of the Trustee to enter into this settlement for two reasons that I could readily think of.

One is that the presence of a receiver will facilitate the ability of the Trustee when he reaches that point in time when he is making a distribution of the customer property to put it into the hands of a Court appointed fiduciary for the purpose of distributing it to the investors of Ascot Capital.

Secondly, Your Honor, the receiver is in a position to pursue causes of action which the Trustee is not by way of its avoidance actions to pursue, and we believe that represents the best and sue surest way of retrieving a monies from Mr. Merkin for the purpose of paying and funding payment of the preference and avoidance

actions.

So we could even utilize those fund not only for the benefit of the investors in Ascot but to the benefit of everyone who was a victim of Madoff Enterprise.

For those reasons I would ask that a settlement be put on the record. Well, actually I would ask my counsel whether he agrees to that, and I would wish simply for Your Honor to say so ordered.

THE COURT: Mr. Markowitz.

MR. MARKOWITZ: Thank you, Your Honor. David Markowitz, from the Investor Protection Bureau of the State of New York.

While I am not a party to this action we thank the Court for the opportunity to be heard today.

THE COURT: You are a designated respondent in the application before me.

MR. MARKOWITZ: Correct. There are two separate issues which were discussed by counsel.

First is the resolution of the immediate application.

And secondly, there is thesubstantive settlement with respect to the SIPC Trustee's claim against Ascot.

With respect to the first, Your Honor, I believe that counsel by and large accurately described what

that resolution is, which is an agreement by all parties to keep the monies frozen at Morgan Stanley with the exception of $350,000 that will be used to initially fund the receivership at which point the receiver will make the independent determinations about the settlement of the substantive claim.

We are in agreement with that proposal. We are also in agreement, which we had discussed earlier, but I don't believe it was mentioned, of a standout of any other claims with respect to the $10 million and to give all parties notice and, of course, the Court notice if any intention to seek any further action with respect to those claims.

Thank you, Your Honor.

THE COURT: Well, to the extent this is a subset of an agreement with respect to an agreement to the now pending motion for a preliminary injunction, I am prepared to so order this record.

However, it does appear to me that the appropriate thing for me to do is to set down for a hearing the application without the need for me to enter or grant a preliminary temporary restraining order because the parties have agreed to eliminate that.

MR. SHEEHAN: Thank you, Your Honor.

THE COURT: So if you will carve out the

papers that are before me to eliminate the TRO, we could set this down to an appropriate hearing.

MR. SHEEHAN: Thank you, Your Honor. We will take it out.

THE COURT: Which is, as we understand, is necessary because the parties who are not here need notice of this resolution.

MR. MARKOWITZ: That is correct. We don't have standing to enter into that agreement and we would agree, Your Honor.

MR. HIRSCHFIELD: Thank you.

MR. SHEEHAN: Thank you, Your Honor. We will take care of submitting the appropriate order.

THE COURT: Yes, it will be a different one or somewhat modified than the one that's attached to your application for TRO and a preliminary injunction.

Does anyone else want to be heard?

Are there any other parties in interest here?

MR. PITOFSKY: My name is David Pitofsky. I am with the law firm of Goodwin Procter. I am not yet a party in interest, but I believe as a result of this agreement I an perhaps a future party.

MR. GELBAR: Lawrence Gelbar, from the law firm of Schulte Roth & Zabel, on behalf of Ascot Partners,

LP.

We support the agreement between the Trustee and the Attorney General's Office and the appointment of the receiver for Ascot.

THE COURT: Thank you.

MR. BUINO: James Buino, from the Dechert law firm for J. Ezra Merkin and Gabriel Capital Corporation.

I was also here for Carey Management, who also was in chambers, and we have no opposition to the agreement.

THE COURT: Thank you.

* * *

C E R T I F I C A T E

STATE OF NEW YORK }
} ss.:
COUNTY OF NEW YORK }

I, MINDY CORCORAN, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That I reported the proceedings in the within entitled matter, and that the within transcript is a true record of such proceedings.

I further certify that I am not related, by blood or marriage, to any of the parties in this matter and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 17th day of June, 2009.

Mindy Rothman-Corcoran

Digitally signed by Mindy Rothman-Corcoran
DN: cn=Mindy Rothman-Corcoran, c=US
Reason: I am the author of this document
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MINDY CORCORAN